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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION
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11 BEVERLY ANN HUTSON,) No. ED CV 08-01085-VBK
12)
13 Plaintiff,) MEMORANDUM OPINION
14) AND ORDER
15 v.)
16) (Social Security Case)
17 MICHAEL J. ASTRUE,)
18 Commissioner of Social)
19 Security,)
20 Defendant.)
21 _____)
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18 This matter is before the Court for review of the decision by the
19 Commissioner of Social Security denying Plaintiff's application for
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have
21 consented that the case may be handled by the Magistrate Judge. The
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to
23 enter judgment upon the pleadings and transcript of the record before
24 the Commissioner. The parties have filed the Joint Stipulation
25 ("JS"), and the Commissioner has filed the certified Administrative
26 Record ("AR").

27 Plaintiff raises the following issues:

28 1. Whether the Administrative Law Judge ("ALJ") properly

1 ("CE") performed on January 15, 2007 at the request of the Department
2 of Social Security by Dr. Smith. (AR 11, 358-364.) As the ALJ noted,
3 the examiner agreed with Plaintiff that her depressive symptoms are
4 secondary to her altered life and her medical issues, and further
5 assessed that there were only minor problems with regard to
6 Plaintiff's mental status evaluation. As the ALJ noted, the CE
7 concluded that Plaintiff was not seriously impaired. (Id.)

8 The ALJ next noted that Plaintiff began counseling with Dr.
9 Jackson, a clinical psychologist, in July 2007. (AR 11, 442.) Then,
10 Plaintiff began seeing a psychiatrist, Dr. Ohiaeri, in September 2007,
11 and in the decision, the ALJ summarized Dr. Ohiaeri's conclusions,
12 noting that the psychiatrist introduced medications and noted
13 improvement with results representative of mild to moderate symptoms.
14 (AR 11, 444-450.)

15 The ALJ noted that psychological reviewers at previous levels of
16 adjudication concluded that Plaintiff's mental impairment is not
17 severe. (AR 11, 366.)

18 While acknowledging that Plaintiff has a medically determinable
19 mental impairment of depressed mood, the ALJ found that this condition
20 does not cause more than minimal limitation in her ability to perform
21 basic mental work activities, and is therefore non-severe. (AR 11.)
22 The ALJ noted that he had considered the four broad functional areas
23 set out in the disability regulations, including activities of daily
24 living ("ADL"), social functioning, concentration, persistence or
25 pace, and episodes of decompensation. Each of these areas was
26 addressed in the decision, with findings that supported a conclusion
27 of a non-severe mental impairment. (AR 11-12.)

1 **A. Applicable Law.**

2 In evaluating psychiatric impairments, 20 C.F.R. §404.1520a(e)(1)
3 and §416.920a(e)(1) require that consideration be given, among other
4 things, to activities of daily living ("ADL"); social functioning;
5 concentration, persistence or pace; and episodes of decompensation.
6 20 C.F.R. §§404.1520a(c)(1) and 416.920a(c)(1) require that
7 consideration be given to "all relevant and available clinical signs
8 and laboratory findings, the effects of your symptoms, and how your
9 functioning may be affected by factors including, but not limited to
10 chronic mental disorders, structured settings, medication and other
11 treatment."

12 20 C.F.R. §§404.1545(c) and 416.945(c) require that consideration
13 be given to "residual functional capacity for work activity on a
14 regular and continuing basis" and "A limited ability to carry out
15 certain mental activities, such as limitations in understanding,
16 remembering, and carrying out instructions, and in responding
17 appropriately to supervision, co-workers, and work pressures in a work
18 setting, [which] may reduce your ability to ... work."

19 The types of relevant evidence to be assessed in making these
20 considerations are set forth in Social Security Ruling ("SSR") 85-16,
21 which include such factors as history, findings, and observations from
22 medical sources, reports of the individual's activities of daily
23 living and work activity, as well as testimony of third parties about
24 the individual's performance and behavior.

25 Under 20 C.F.R. §404.1520a(c)(2) and §416.920a(c)(2),
26 consideration must be given to the extent to which a mental impairment
27 interferes with an "ability to function independently, appropriately,
28 effectively, and on a sustained basis ..."

1 The degree of functional limitations in four broad areas (ADLs;
2 social functioning; concentration, persistence or pace; and episodes
3 of decompensation) are evaluated; that is, as to the first three
4 functional areas, the following five-point scale is utilized: none,
5 mild, moderate, marked, and extreme. With regard to the fourth area,
6 a four-point scale is utilized: none, one or two, three, four or more.
7 (20 C.F.R. §§416.920a(3),(4) and 404.1520a(c)(3),(4).

8 Following the September 2000 amendments to the regulations which
9 modified 20 C.F.R. §404.1520a(e)(2) and §416.920a(e)(2), the
10 Administrative Law Judge ("ALJ") is no longer required to complete and
11 attach a Psychiatric Review Technique Form ("PRTF"). Instead, these
12 regulations require that in the decision, the ALJ,

13 "[M]ust incorporate the pertinent findings and conclusions
14 based on the [PRTF] technique. The decision must show the
15 significant history, including examination and laboratory
16 findings, and the functional limitations that were
17 considered in reaching a conclusion about the severity of
18 the mental impairment(s). The decision must include a
19 specific finding as to the degree of limitation in each of
20 the functional areas described in paragraph (c) of this
21 section." [that is, ADLs; social functioning; concentration,
22 persistence or pace; and episodes of decompensation.]

23
24 Further guidance is provided in SSR 85-16, which, although it
25 does not specifically mention concentration, persistence or pace, does
26 note, "Ability to sustain activities, interests, and relate to others
27 over a period of time. The frequency, appropriateness, and
28 independence of the activities must also be considered" as well as

1 "ability to function in a work-like situation."

2 When there is finding of "moderate" difficulties in the area of
3 maintaining concentration, persistence or pace, this factor must be
4 included in any hypothetical question posed at a hearing to a
5 vocational expert ("VE"). Thus, one court has held that referring
6 merely to "simple jobs" or "unskilled sedentary work" in a
7 hypothetical question is insufficient to describe and to accommodate
8 difficulties in this functional area. See Newton v. Chater, 92 F.3d
9 688 (8th Cir. 1996).

10 The regulations do not provide a standard definition of
11 "moderate." (See 20 C.F.R. §416.902a(c)(4).) They do note, however,
12 that a finding of "none" or "mild" in the first three areas "will
13 generally [mean] that your impairment(s) is not severe, ..." See 20
14 C.F.R. §920a(d)(1).

15
16 **B. Discussion.**

17 Plaintiff first contends that the ALJ failed to properly consider
18 the treating psychiatrist's opinion, and then refers to the treating
19 psychologist, Dr. Jackson. (JS at 3, et seq.) It would appear,
20 rather, that Plaintiff is referring to her psychiatrist, Dr. Ohiaeri.
21 As to Dr. Ohiaeri, the ALJ did in fact summarize Dr. Ohiaeri's
22 conclusions, but determined that based on clinical evidence to the
23 contrary, such as the opinion of the CE, Plaintiff's mental
24 impairments were non-severe.

25 Even if Plaintiff is referring to her psychologist, Dr. Jackson,
26 the record contains merely a brief handwritten note by Dr. Jackson
27 indicating that she has seen Plaintiff 11 times between July 19, 2007
28 and February 19, 2008; that Plaintiff was seen by her for severe

1 anxiety and depression, exacerbated by medical conditions; that she
2 was referred to a psychiatrist for medication evaluation; and that she
3 has made good use of treatment. (AR 442.) The ALJ's reference to Dr.
4 Jackson is not inadequate, because Dr. Jackson indicated no functional
5 limitations whatsoever.

6 Perhaps more appropriate to consideration of Dr. Jackson as a
7 medical source is Plaintiff's second issue, which is that the ALJ
8 failed to properly develop the record by obtaining documentation of
9 the 11 mental health visits which Dr. Jackson references in her brief
10 note. There is certainly no disagreement as to the law, which
11 requires that where a record is inadequate to allow for proper
12 evaluation of the evidence, the ALJ must develop the record or
13 "conduct an appropriate inquiry." (See Smolen v. Chater, 80 F.3d 1273,
14 1288 (9th Cir. 1996).) Here, though, the record is not ambiguous.
15 First, there is substantial evidence in the record from Plaintiff's
16 treating psychiatrist, Dr. Ohiaeri. In addition, it is relevant to
17 note that Plaintiff had the burden to produce evidence to the ALJ to
18 support the existence of a severe impairment at the second step of the
19 evaluation process. (20 C.F.R. §§404.1512(a), 404.1740(b)(1).) Of
20 course, the fact that the burden is on the Plaintiff does not, in an
21 appropriate case, relieve the ALJ of his own obligation to develop the
22 evidence. But, again, that depends on the existence of an inadequacy
23 or ambiguity which requires further development. Here, as noted,
24 there is ample evidence in the form of the reports of the treating
25 psychiatrist, as well as the report of the CE, Dr. Smith. Dr.
26 Jackson's note does not give any indication of a continuing and severe
27 mental impairment, and in fact, indicates at its conclusion that
28 Plaintiff has made good use of her treatment.

1 Finally, the ALJ followed the required protocol in evaluating
2 whether or not Plaintiff has a severe mental impairment, by reviewing
3 the evidence concerning four broad functional areas. Plaintiff has
4 raised no objection to the ALJ's specific evaluation of these
5 functional areas, which is a critical component in the determination
6 of whether a person has a severe mental impairment. Thus, the Court
7 finds that the ALJ did not fail to develop the record with regard to
8 obtaining further information regarding Dr. Jackson's treatment of
9 Plaintiff.

10 Finally, and implicit in the Court's previous discussion, there
11 is no error with regard to the fifth issue, with concerns, in general,
12 the adequacy of the ALJ's evaluation of the evidence regarding the
13 severity of Plaintiff's mental impairments. The Court has noted that
14 the ALJ evaluated the report of the CE, as well as Plaintiff's
15 functioning in the four critical areas relevant to a determination of
16 the existence of a severe mental impairment. The ALJ further fully
17 and fairly evaluated the report of the treating psychiatrist, who,
18 although he diagnosed bipolar disorder, indicated that it is mild. (AR
19 444, 446-449.)

20 For the foregoing reasons, the Court finds no error with regard
21 to Issues 1, 2, and 5.

22 II

23 THE ALJ DID NOT FAIL TO PROPERLY CONSIDER LAW WITNESS STATEMENTS

24 In her third issue, Plaintiff contends that the ALJ erred by
25 failing to mention statements of her husband, Steven Hutson, who
26 complete a Third Party Questionnaire. (AR 98-105.)

27 Plaintiff correctly cites Ninth Circuit precedent which holds
28

1 that the testimony of competent lay witnesses must be considered by
2 the ALJ. In this case, however, for the reasons to be noted, any
3 error must be considered harmless.

4 At the hearing before the ALJ (AR 28-47), Plaintiff was asked to
5 describe the physical problems that she believes keep her from being
6 able to work. Her testimony is set forth below:

7 "A Fatigue, mental fatigue, pain in all of my joints.
8 Basically, the number one is my hands and wrists. I have
9 very little use of them. Can do hardly anything that I used
10 to do with my hands. And mental fatigue or physical fatigue
11 that causes confusion. But if I do anything due to the
12 fibromyalgia, it's running to doctors. It puts me down with
13 pain in all my joints where you feel like you've been hit by
14 a truck if you do anything. Like I said, just running to
15 the doctors. It I do anything any days in a row --

16 Q Okay.

17 A -- it causes -- it puts me down. All the joints begin to
18 swell. If I'm stressed at all, my joints begin to swell.
19 Not swell. I'm sorry. That's not the word. They do not
20 swell. They hurt. They ache. I can't move them. I can't
21 hold anything. But the mental - the fatigue completely puts
22 me down, also. The -- if I go anywhere, do anything,
23 whether it's fun things or doctor things, I -- I can't exert
24 myself because then everything flares up."

25 (AR 33-34.)

26
27 If Plaintiff's testimony as to her physical limitations is
28 compared to the statements of her husband, it is apparent that Mr.

1 Hutson's evaluation is that Plaintiff is far less limited than
2 Plaintiff herself claims. For example, when describing her daily
3 activities, Mr. Hutson indicated that Plaintiff, "Has coffee, takes
4 pets outside, checks wild bird feeders, talks on phone, makes bed,
5 does personal hygiene bath shower etc., laundry, light house cleaning
6 runs errands if needed, light shopping if needed. Watches T.V. reads
7 paper, visits with neighbors and friends." (AR 98.)

8 Similarly, Mr. Hutson indicated that Plaintiff takes care of the
9 household pets, feeds and water them, takes them outside, but has a
10 problem pushing her tops (clothing) overhead, pulling on boots,
11 pushing to get out of the bathtub, and has difficulty holding the blow
12 dryer and curling iron. (AR 99.) This certainly does not approach the
13 severity of Plaintiff's own description which is that she can hardly
14 do anything she used to do with her hands. (AR 33.)

15 When describing Plaintiff's abilities in the area of house and
16 yardwork, Mr. Hutson described Plaintiff's ability to do light
17 cleaning, laundry, water the yard, and wash the dishes. (AR 100.)
18 Again, this description of Plaintiff's activities far exceeds that of
19 Plaintiff's own subjective assessments.

20 Based upon the foregoing analysis, it is difficult to perceive
21 what error Plaintiff contends was committed with regard to the failure
22 to discuss Mr. Hutson's observations. Although the ALJ did not
23 formally discuss the observations of Plaintiff's husband, any error
24 was clearly harmless. See Stout v. Commissioner, 454 F.3d 1050 (9th
25 Cir. 2006). For that reason, there is no error with regard to the
26 third issue.

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III

THE ALJ PROPERLY EVALUATED EVIDENCEREGARDING PLAINTIFF'S DECOMPENSATION

In her fourth issue, Plaintiff asserts that the ALJ misrepresented the evidence by indicating that Plaintiff had no episodes of decompensation. (JS at 11, citing AR 12.) Plaintiff asserts that her treatment plan (see AR at 444) indicates an increase in dosage of medications which reflects significant decompensation. (JS at 11.)

The Court agrees with the Commissioner's contention that increase in the dosages of these medications is not reflective of evidence of decompensation. Further, in order to establish a Listing Level severity of mental impairment, evidence must establish that Plaintiff experienced "repeated episodes of decompensation, each of extended duration." (See 20 C.F.R. Part 404, subpart p, Appendix I, Listing 12.00(C)(4).) Indeed, Plaintiff points to no evidence other than an increase in medications accompanied by a speculative belief that this demonstrates the necessary evidence of decompensation required under the Listing. The evidence would appear to indicate that Plaintiff has mood symptoms which are long-lasting, including fast thinking, and Plaintiff herself, according to Dr. Ohiaeri, reported that "her mood started changing after she was diagnosed with thyroid problems 20 years ago." (AR 444.)

Thus, in sum, there is nothing in the records of the treating psychiatrists which would substantiate a reasonable finding that Plaintiff has suffered the requisite symptoms to constitute episodes of decompensation. For that reason, the Court finds no error with regard to Plaintiff's fourth issue.

The decision of the ALJ will be affirmed. The Complaint will be dismissed with prejudice.

IT IS SO ORDERED.

DATED: May 8, 2009

/S/

VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE